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JUN 11 1987

JOSEPH F. SPANIOL, JR.
CLERK

86-2016
No. _____

In The
Supreme Court of the United States

October Term, 1986

GREG MYERS, etc., et al.,

Petitioners,

vs.

R. KATHLEEN MORRIS, etc.,

Respondent.

and

DONALD BUCHAN, etc., et al.,

Petitioners,

vs.

R. KATHLEEN MORRIS, etc.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Eighth Circuit

PETITION FOR CERTIORARI

KURZMAN, GRANT, MANAHAN,
BLUTH AND BARKER

Marc G. Kurzman

Counsel of Record

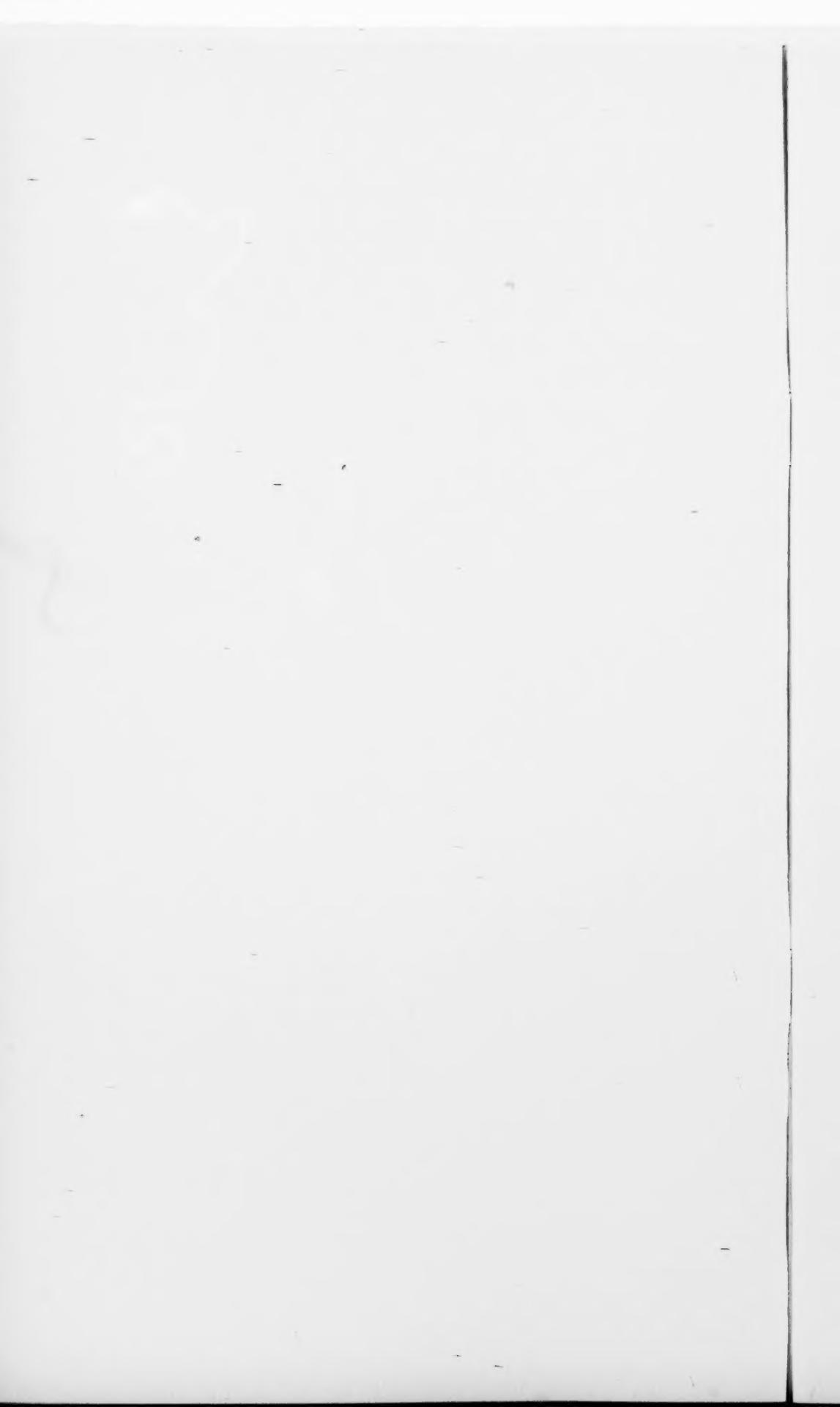
Carol Grant

2404 Stevens Avenue South

Minneapolis, Minnesota 55404

(612) 871-9004

Counsel for Petitioners



A. QUESTIONS PRESENTED FOR REVIEW

I. Is a prosecutor absolutely immune from liability under 42 U.S.C. § 1983 regardless of the fact that she took over a child sex abuse investigation, directed the isolation of potential child complainants from their families in violation of federal and state law, repeatedly interrogated and manipulated the children, such that their testimony became accusatory and foreseeably unreliable, destroyed exculpatory evidence, and conspired with other county employees and their agents in these activities and a cover-up?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

II. Do parents and children lose the familial protections afforded by the United States Constitution merely because an assertion has been made alleging that the children have been sexually abused by the parents?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

III. Do allegations of a conspiracy to violate civil rights between a prosecutor, sheriff and his deputies, social workers, therapists and guardians pierce the co-conspirators' immunities when acts taken in furtherance of the conspiracy include prosecutorial investigation; suppression of exculpatory evidence and presentation of false and misleading information at probable cause, pretrial and final hearings; and engaging in activities foreseeably damaging to the mental health of the children in violation of court order in which the co-conspirators were required to serve the best interests of the children?

The Court of Appeals for the Eighth Circuit held: in the negative.

IV. Does grossly negligent conduct by state officials rise to the level of a constitutional tort?

The Court of Appeals for the Eighth Circuit held: in the negative.

V. Are "therapists" and guardians ad litem absolutely immune from liability under 42 U.S.C. § 1983 when acting outside the scope of their court-ordered authority and engaging with police in investigative activities, in clear disregard of the

psychological damage such activities entail to the children involved in the court proceedings?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

VI. On a pre-discovery *Harlow v. Fitzgerald* summary judgment motion, where plaintiffs have not had the opportunity to present evidence in support of their complaint allegations, can an appellate court make the factual determination that police officers and other officials are immune because they acted in good faith?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

B. LIST OF PARTIES

The complete list of parties for the cases on appeal (hereinafter *Myers-Buchan*) appear in the Appendix to this petition.

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PETITION FOR CERTIORARI

Petitioners Myers and Buchan families pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding.

E. OPINIONS IN THE COURTS BELOW

In re Scott County Master Docket, 618 F. Supp. 1534 (D. Minn. 1985); Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987).

F. JURISDICTIONAL GROUNDS

Petitioners seek review of a decree filed by the Court of Appeals for the Eighth Circuit on February 3, 1987, and the denial of a petition for rehearing in that same matter, which denial was entered by the Court of Appeals for the Eighth Circuit on April 9, 1987. The statutory provision believed to confer on this Court jurisdiction to review the decrees in question by writ of certiorari is 28 U.S.C. § 1254 (1).

G. CONSTITUTIONAL PROVISIONS, ORDINANCES, AND REGULATIONS WHICH THE CASE INVOLVES

CONST. amendment I provides:

“Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble...”

CONST. amendment IV provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

CONST. amendment V provides:

“No person shall be...deprived of life, liberty, or property, without due process of law...”

CONST. amendment XIV provides:

“...nor shall any state deprive any person of life, liberty or property without due process of law. . .””

CONST. amendment VIII provides:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

Minn. Code Admin. Regs. 9560 *et seq* requires preservation of the family unit in alleged neglect situations (See Appendix).

H. STATEMENT OF THE CASE

These cases are civil rights actions brought by Deputy Sheriff Donald Buchan, his wife Cindy, and his three children (who were four, two, one years old when the cause of action arose), and Greg Myers (who was a Jordan police officer at the time), his wife Jane Myers, and the three Myers children (who were ages twelve, four and one years old at the time the cause of action arose). The adult petitioners had been charged with criminal sexual misconduct involving the child petitioners in 1984. The persons responsible for these charges were respondents former Scott County Attorney Kathleen Morris, former Scott County Sheriff Douglas Tietz, Scott County deputies Dave Einertson, Pat Morgan, Michael Busch, and Norm Pint. To further the prosecutions, Morris and police frequently met and/or communicated with respondent Peg Subby, former Director of Scott County Human Services, and her social workers, Doris Wilker, Mary Tafs, and Judy Dean, social worker "therapist" Thomas Price, "therapist" Michael Shea and psychologist Susan DeVries, as well as guardians ad litem Paul Thomsen and Diane Johnson. Eventually state family court judges, after weeks of trial, dismissed the allegations of

abuse. The families were reunited when the prosecutor dismissed the criminal charges against the adult plaintiffs. Petitioner parents and children thereafter commenced suits in federal court alleging that these defendants conspired to deprive, and deprived them of their constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments and their civil rights protected under 42 U.S.C. § 1983.

Defendants brought a pre-discovery motion to dismiss and for summary judgment, claiming absolute and/or qualified immunity for their activities in these, the most highly publicized cases in the history of the State of Minnesota. The motions (except those of the guardians and respondent "therapist" Shea) were denied by Federal District Court Judge Harry MacLaughlin on June 10, 1985. Judge MacLaughlin vacated his order denying summary judgment to "therapist" Price on October 1, 1985. The defendants appealed and a three-judge panel of the Court of Appeals for the Eighth Circuit held, on February 3, 1987, that all of the individual defendants were immune from liability. A petition for rehearing and rehearing en banc was denied on April 9, 1987.

During the summer and fall of 1983, petitioner Office Greg Myers acted as "whistleblower" with respect to corruption in the Jordan Police Department, corruption which was sufficiently apparent that a petition drive was commenced urging the Jordan city council to investigate it.

In September, 1983, a previously-convicted child molester, James Rud, was identified as having abused more children. Circumstantial evidence corroborated accusations as they expanded to Rud's immediate family and close friends.

The case began to generate media attention. Respondent County Attorney Morris, who had received much favorable publicity for prosecuting a ring of child sexual abusers several years earlier, actively took over the investigation. Respondent Morris and deputy sheriffs began asking children whether they *knew* Officer Myers. These children responded they did not know Officer Myers and could not even identify his picture. A guardian ad litem, Diane Johnson, who participated in Morris' questioning sessions, told the children's therapist, respondent Susan Phipps Yonas, that ". . . a Jordan police officer may be involved."

Phipps Yonas then questioned children Jeff and Brandy Brown, who said Officer Myers did nothing to them, although they knew him as a social acquaintance of their parents. By this time, in February, 1984, Jeff and Brandy had already been questioned numerous times by respondents Morris and deputy sheriffs, and had said nothing about Officer Myers when identifying adults who had allegedly sexually abused them.

Meanwhile, respondent Deputy Busch repeatedly questioned eleven-year-old Kathy Fossen, another alleged Rud victim. Morris allowed Kathy to stay at her parents' home although she believed that Kathy had been abused by her father, her siblings, and was engaged in sex with Jeff and Brandy Brown. Kathy's mother was cooperating with Morris by bringing her child in repeatedly to accuse an ever-widening circle of supposed sexual abusers. Kathy had been asked on three or four separate occasions whether Officer Myers did anything to her, and she stated he had not.

On February 6, 1984, Officer Myers was arrested without warrant and his children removed from their home by respondent deputies and social worker Wilker upon the advice of respondent County Attorney Morris. On that date, Kathy Fossen, Jeff and Brandy Brown had been again interrogated by respondent deputy sheriffs, at least, and all three (who were given opportunities to speak with each other), allegedly finally agreed with their interrogators that Officer Myers sexually abused them. No allegations were made regarding petitioner Jane Myers, who was left standing in her driveway pleading with respondents social worker Wilker, Deputy Morgan and others to allow her children to reside with their maternal grandparents or stay with her while Officer Myers was out of the home.

Petitioner Myers' children were taken to Kathleen Morris, who interrogated them. That evening, the youngest were taken for a physical examination which disclosed no evidence of abuse, and during which the children specifically said their dad had not touched them. These facts were suppressed from the courts and the children's parents for a full year.

Petitioner Myers' children then were completely isolated by respondents from their parents, grandparents, and even great-grandparents (one of whom has died while these proceedings have been pending). Respondent County Attorney Morris directed respondent Peg Subby, as head of the Department of Human Services in Scott County, to violate rules and regulations enacted pursuant to federal statutes, directed at maintaining the welfare of children removed from their homes, facilitating at least supervised visitation while abuse allegations are pending, and ultimately reuniting families. The children instead were totally isolated from their parents; their mail to one another was diverted so that it was not received; the children's religions were changed; and their last names were changed. Still, the children insisted that they had not been abused.

The Scott County Juvenile Court ordered respondent social worker Thomas Price, who had worked with respondents in the past, to evaluate the Myers children's counseling needs. Price and the County Attorney's office, who had a psychologist evaluate the Myers children, hid from the courts and the family for six months the psychologist's report that there was no evidence of abuse and that the Myers children were about to break down because of their separation from their family. By this time, the children were being interrogated by the various respondents so frequently that the Myers girl, for example, was often confused about whether she would be going to school on a particular day or would be interrogated. Social worker Price finally got the oldest Myers boy to agree that a "vision" of sexual abuse by his mother was probably a memory and then asked the Myers girl a litany of questions like "Is your brother a liar?", thereby procuring her agreement with the accusation. The Myers children simultaneously kept telling respondent inquisitors that nothing had happened, but these protestations were ignored and the interrogations continued.

After Officer Myers was arrested, his neighbors, petitioner Deputy Donald Buchan and his wife, Cindy, affected by the hysteria sweeping the City of Jordan, took their daughter to their family doctor. The family doctor assured them their daughter had not been abused. Nevertheless, the Buchan parents took their daughter to respondent County Attorney

Morris "to be sure"; Morris also concluded the daughter had not been abused. The Buchans finally took their daughter to the doctor to whom Morris had been referring other children. That doctor also agreed the daughter had not been abused.

On May 22, 1984, Deputy Buchan, along with other Scott County deputies, viewed a videotape jointly made by respondents Deputy Busch, "therapist" Price, and "guardian" Thomson. Deputy Buchan observed that the oldest Myers boy was inconsistent while being directed in answering by Price.

The May 22nd videotape was destroyed by the State. Thereafter, respondents began questioning the Myers children about Donald and Cindy Buchan, and eventually accusations were elicited using the same modus operandi that had produced accusations from other children witnesses who had repeatedly insisted they had not been abused.

By mid-summer, 1984, the children had been questioned so repeatedly and intensely that they began telling stories of murder and mutilation. These stories were not actively pursued by the Scott County deputies because they were so ridiculous — nor were they disclosed to the defense, because they were so exculpatory. The Minnesota Bureau of Criminal Apprehension (BCA) agent who had been assigned to the Buchan case determined that the Buchans were innocent and he told respondent Morris he did not want to testify at their trial. In September, 1984, a juvenile court trial was held in regard to the welfare of the Buchan children. The juvenile court judge found that "the record is replete with leading and suggestive questioning of children" and concluded that there was no clear and convincing evidence to support the allegations of sexual abuse against the Buchans. Nevertheless, respondent Morris began the Buchan criminal trial only to dismiss all charges two weeks later when the defense learned of the murder/mutilation stories.

An FBI/BCA Task Force was established and took these cases away from respondent County Attorney Morris. The murder/mutilation stories were fully debunked; the agent assigned to the Myers testified he was 100 percent certain that the Myers never abused any children, and that Greg Myers was arrested without probable cause. The Myers family was finally

reunited after a juvenile court trial — after over one year of separation and isolation. The new court-appointed psychiatrists testified that the oldcast Myers boy suffered from post-traumatic stress syndrome induced by prolonged separation from his family and traumatic questioning. Inpatient psychiatric care was required for this child.

Due to public outrage, a Governor's Commission was established to investigate respondent Morris' malfeasance and did, in fact, find that she had engaged in malfeasance in the handling of these cases.

I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the Minnesota Federal District Court was conferred by 28 U.S.C. § 1343 (3).

J. ARGUMENT FOR ALLOWANCE OF THE WRIT

1. *Prosecutorial Immunity.* With respect to the scope of prosecutorial immunity, the Court of Appeals for the Eighth Circuit has decided an important question of federal law which has not been, but should be settled by this Court. This Court specifically anticipated, but left open the question, in *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The question is whether "a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's." *Id.* at 430. The question again was noted in *Butz v. Economou*, 438 U.S. 478, 511 n.37 (1978), but never explicitly addressed.

The Court of Appeals for the Eighth Circuit agreed with a number of federal courts that a prosecutor is not entitled to absolute immunity for conduct which is not "intimately associated with the judicial phase of the criminal process." However, this Court should finally settle the important issue.

The question then becomes identifying those acts entitled to absolute immunity by virtue of their quasi-judicial aspects. As stated in *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), "Delinea-

tion of the precise scope of protected advocacy conduct beyond the boundaries established in *Imbler* has proved to be exceedingly difficult". Many courts, such as the Eighth Circuit in the instant case, have employed an advocacy/ investigative/ administrative trichotomy in analyzing prosecutorial functions.¹ The functional categories are sometimes limited to an advocacy/ investigative dichotomy.² Yet other courts have advocated a balancing test for analyzing prosecutorial conduct that falls neither clearly within nor clearly without the scope of *Imbler*.³ In any event, "*There is no clear consensus on how to properly characterize all of the various forms of prosecutorial conduct. This lack of a consensus is plainly attributable to an absence of any settled approach to determining when absolute immunity implies.*" *Gray v. Bell, supra*, at 500 (emphasis added).

The lack of guidance with respect to determining when absolute prosecutorial immunity applies has led to conflicting decisions among the federal courts of appeals. In *Myers-Buchan*, for example, the Court of Appeals for the Eighth Circuit concluded that a prosecutor had absolute immunity for repeatedly interrogating child witnesses, despite police complaint that she "took over" and "usurped" the investigation. The Eighth Circuit panel argued that some investigative case preparation can be regarded as advocacy, citing *Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977) (supervision of police dragnet operation that resulted in plaintiff's illegal arrest held to be advocacy). *But see Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974) (supervision of police activities resulting in plaintiff's illegal arrest at May Day demonstration held to be non-advocacy). Compare also the post-*Atkins* case *Rex v. Teeple*, 753 F.2d 840, 843 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 332 (when a prosecutor participates in the interrogation, he has

¹ See also *McSurely v. McClellan*, 697, F.2d 309, 318 (D.C. Cir. 1982); *Taylor v. Kavanagh*, 640 F.2d 450 (2nd Cir. 1981); *Mancini v. Lester*, 630 F.2d 990 (3rd Cir. 1980).

² See *United States v. Heldt*, 668 F.2d at 1276; *Forsyth v. Kleindiest*, 599 F.2d at 1214-15; *Atkins v. Lanning*, 556 F.2d, 616 (10th Cir. 1977).

³ E.g., *Gray v. Bell, supra*.

engaged in police-related work and is not entitled to absolute immunity). The Court of Appeals for the Eighth Circuit also cited *Cook v. Houston Post*, 616 F.2d 719 (5th Cir. 1980) in support of its position. While *Cook* gave absolute immunity to a prosecutor who merely interviewed witnesses before presenting their testimony to a grand jury, the same court held, in *Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir. 1980), that "a prosecutor who assists, directs, or otherwise participates with the police, in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities." Other courts have held that the preliminary gathering of evidence which may blossom into a prosecution is investigatory activity receiving only a qualified immunity. *McSurely v. McClellan, supra* at 320.

Of course, none of these cases involved prosecutorial activities so blatantly investigative as those in *Myers-Buchan*, where the prosecutor "usurped" the entire investigation according to involved law enforcement officers; personally interrogated and re-interrogated little children dozens and dozens of times; destroyed file materials, and a calendar which would have reflected at least some of these interrogations; and claimed she "couldn't remember" when the frequency and intensity of the interrogations became an issue in litigation. The Court of Appeals for the Eighth Circuit would not even permit a jury to consider the prosecutor's liability for these activities and participation in a cover-up.

The Court of Appeals for the Eighth Circuit also endorsed the view that the withholding or suppressing of the exculpatory evidence is activity for which a prosecutor should be absolutely immune. Other federal circuit courts have not so held. E.g., *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980) (knowing failure to preserve exculpatory evidence held to be non-advocatory).

The *Myers-Buchan* decision effectively *abolishes a prosecutor's qualified immunity and replaces it with absolute immunity in disregard of the distinctions drawn by this Court in Imbler v. Pachtman, supra*, and in contradiction to the decisions of other federal courts of appeals, necessitating this Court's intervention.

2. Familial Liberty Interests. Petitioner parents and children argue that liability should attach to the government officials and their agents who separated and totally isolated the family members for one-year period, diverting mail and permitting not even supervised visitation. The prolonged separation of parents and children was initiated even though there was absolutely no suspicion with respect to one parent (Jane Myers); and the other parent had offered to move out of the house and have only supervised contact with his children until charges were resolved (Greg Myers). The Court of Appeals for the Eighth Circuit nevertheless held that the parental liberty interest in keeping the family unit intact is not a clearly established right in the context of "arguable probable cause" and suspicion that one of the parents may be abusing at least one of the children. The decision ignores principles clearly established by this Court, including:

- a) "Substantive familial rights have long been considered 'the basic civil rights of man'". *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
- b) A parent's interest in personal contact with his child is protected by due process so long as the parent has accepted some measure of responsibility for the child's upbringing. *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).
- c) "If there is a delay between the doing and undoing (separation and reunion), parents suffer from the deprivation of their children and the children suffer from uncertainty and dislocation." *Stanley v. Illinois*, 405 U.S. 645, 647 (1982).
- d) "The fundamental liberty interest of parents in the care, custody and management of their children does not simply evaporate because they have lost temporary custody to the state." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
- e) "Even when blood relationships are strained parents retain a vital interest in preventing the ir- retrievable destruction of their family life." *Id.* at 753.

- f) "When the state moves to destroy weakened familial bonds it must provide the parents with fundamentally fair procedures." *Id.* at 753.
- g) "The state's interest, *parens patriae*, is in preserving and promoting the welfare of the child....yet, while there is still reason to believe that a positive, nurturing parent-child relationship exists, the *parens patriae* interest favors preservation, not severance of natural family bonds." *Id.* at 767.
- h) "Any *parens patriae* interest in terminating natural parents rights arises only after the parents have been found to be unfit." *Id.* at n. 17.

In *Santosky v. Kramer, supra*, the children had been subjected to "shockingly abusive treatment", including broken bones, bruises, blisters and pin pricks. *Id.* at 781. Still, the countervailing governmental interest was deemed "slight" compared to the "commanding familial interest". *Id.* at 758. Chief Justice Rehnquist wrote a dissent in *Santosky* which repeatedly emphasized how the state had diligently engaged in efforts to reunite the parents and children during the period in question. *Id.* at 745. The dissenters felt that the process leading to termination of parental rights in that case was fair because it incorporated means "to assist and encourage parents who have lost custody of their children to reassume their right familial role". *Id.* at 780. Chief Justice Rehnquist devoted many pages to describing the services made available to reunite the parents and children, concluding that it was an extraordinary four-year effort.

The activities designed to thwart such reunification efforts formed the basis for complaint in the instant case. Federal law mandates the state to create rules and regulations providing that in dealing with child abuse, the local welfare agency shall preserve the family whenever possible through a variety of means. In *Myers-Buchan*, the prosecutor directed human services to violate the state rules and regulations, which human services did, aided and abetted by respondent social workers, guardians and therapists. For example, the last name of the Myers

children was changed; the children's religion was changed in direct violation of federally mandated state rules; the children were completely isolated from not only their parents but extended family such as innocent grandparents, one of whom has died during this litigation. While the Court of Appeals for the Eighth Circuit *never even acknowledged the interests of the majority of plaintiffs in this case, i.e. the children*, this Court has held that the state cannot presume parent and child are adversaries, even in neglect proceedings. *Id.* at 760. *Santosky* at 760. This Court has discussed state law that recognizes the potential harm to children of extended, nonpermanent foster care and the deleterious effects of separation from family on children's development into responsible, productive citizens. *Id.* at 789 n.15.

Other federal courts of appeals have rendered decisions consistent with the directives of this Court regarding the familial liberty interests, and therefore in conflict with the decision of the Court of Appeals for the Eighth Circuit in the instant case. *E.g., Shondel v. McDermott*, 775 F.2d 859, 865 (7th Cir. 1985) ("A state....government that forces a person to live apart from his family deprives him of a form of liberty that is protected by the due process clause of the Fourteenth Amendment"); *Duschesne v. Sugarman*, 566 F.2d 817, 825 (2nd Cir. 1977). Because the Eighth Circuit Court of Appeals has decided an important federal question in a way in conflict with the applicable decisions of this Court, and accordingly with the decisions of other federal courts of appeals, this Court should review the instant case on certiorari.

3. *Conspiracy.* The Court of Appeals for the Eighth Circuit dismisses petitioners' conspiracy allegations on the ground that "acts which these [respondents] performed, attending court appearances, making recommendations to the family court, questioning children about their versions of events and reporting statements and opinions concerning abuse, were expressly or implicitly within their professional duties," citing *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986). *Ashelman* focuses on judicial immunity and holds that a conspiracy to determine the outcome of a judicial proceeding, however improper, does not

pierce judicial immunity if the harm is inflicted by judicial acts to which immunity would apply. In other words, a conspiracy to violate civil rights is not actionable if a judge uses judicial means to accomplish an illegal end. Several other federal courts of appeals have so held, relying on *Stump v. Sparkman*, 435 U.S. 349 (1978). *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985); *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985); *Green v. Maraio*, 722 F.2d 1013 (2nd Cir. 1983). "The precedential strength [of *Sparkman*,] however, is debatable. The Supreme Court granted certiorari on the issue of derivative immunity...and denied certiorari on the issue of judicial immunity [in that case]". *Ashelman v. Pope*, *supra* at 1077 n.2. This reading of *Stump v. Sparkman* also flies in the face of the definition of criminal and civil conspiracy, which is the same:

"A conspiracy is a combination of two or more persons who, by concerted action, seek to accomplish some unlawful purpose [by lawful means], or to accomplish some lawful purpose by unlawful means."

DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.04 (3rd ed. 1977); *Singer v. Wadman*, 745 F.2d 606 (9th Cir. 1984), *cert denied*, 105 S. Ct. 1396.

Federal courts of appeals have rendered decisions in conflict with the decision of the Court of Appeals for the Eighth Circuit on this matter. In *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985), a mother alleged that the sheriff's department conspired with her ex-husband to deprive her of the custody of her children; specifically, that as a "proximate result of the defendants' actions [she had] been wrongfully deprived of the custody of her children..." *Id.* at 941. This allegation raised an issue of fact precluding summary judgment. As in the instant case, the *Hooks* defendants cut off contact between the mother and her children. As in the instant case, the mother's letters did not get to her children. The defendants' argument that the mother was charged with a felony and their action was in the nature of an emergency to protect the welfare of the children did not defeat the conspiracy claim.

In *Anthony v. Baker*, 767 F.2d 657, 662 (11th Cir. 1985), the court held that state officials are liable under 42 U.S.C. § 1983 when they conspire to procure charges based on fabricated evidence or false, distorted, or perjurious testimony presented to official bodies in order to bring about a conviction. The plaintiffs in that case also alleged, like petitioners Myers and Buchans, that the officials covered up exculpatory evidence and defendants were grossly negligent in their failure to supervise subordinates.

Petitioners strongly dispute the Eighth Circuit's characterization of alleged co-conspirators' activities as quasi-judicial. The prosecutor took over the investigative activities and destroyed exculpatory evidence; and the deputies presented false and misleading information to the courts to establish probable cause and to prolong the separation of parents and children. A reasonable police officer would have known that the duration and intensity of interrogation of the child complainants would lead to fabricated accusations such as the ridiculous murder/mutilation stories (which were then concealed from petitioners' counsel). The "guardians" and "therapists" permitted and participated in pummelling the children with similar interrogation and made recommendations counterproductive to the mental health of the children in order to further the conspiratorial end — to deprive petitioners of their civil rights. These defendants then engaged in a conspiracy to cover up, similar to that which occurred in the *Watergate* scandal.

4. *Immunity for Gross Negligence.* Petitioners allege that all respondents, in addition to conspiring against them, were grossly negligent in contributing to their prosecution and the removal of children from their homes. The Court of Appeals for the Eighth Circuit dismissed this claim on the ground that "allegations that the sheriff or other defendants deprived plaintiffs of procedural or substantive due process interests through negligent or 'grossly negligent' conduct does not state a claim under 42 U.S.C. § 1983," citing *Daniels v. Williams*, 106 S. Ct. 662 (1986) and *Davidson v. Cannon*, 106 S. Ct. 668 (1986).

In fact, the issue of immunity for grossly negligent conduct was specifically reserved by this Court in *Daniels* and *Davidson*. The holding in *Daniels* is "that mere lack of due care by a state official" does not deprive an individual of life, liberty or property under the Fourteenth Amendment. *Id.* at 665 (emphasis added). The inmate petitioner in that case claimed he slipped on a pillow negligently left on the stairs by the respondent correctional deputy stationed at the jail. This Court stated, "Despite his claim about what he might have pleaded, petitioner concedes that respondent was at most negligent. Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of the due process clause". *Id.* at 667 n.3.

Similarly, in *Davidson v. Cannon, supra*, the district court concluded that the prison officials' conduct was not reckless, so the issue of immunity for grossly negligent conduct was not decided. Justices Blackmun, Marshall and Brennan, however, expressed substantial doubts about the district court's conclusion regarding recklessness and specifically recommended remanding for review of that conclusion. The three justices specifically indicated that recklessness or deliberate indifference is all that a petitioner must prove to show a violation of the Fourteenth Amendment Due Process Clause in the context of a § 1983 lawsuit.

Thus, the Court of Appeals for the Eighth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided the federal question in a way in conflict with the expressed view of three justices of this Court.

5. *Court-Appointed Immunity.* The Court of Appeals for the Eighth Circuit held, in *Myers-Buchan*, that therapists and guardians who are appointed by a court to fulfill quasi-judicial responsibilities are absolutely immune from suit under 42 U.S.C. § 1983. The court relies on *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984). *Kurzawa* interpreted this Court's decision in *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983) to

mean that persons who are integral parts of the judicial process are entitled to absolute immunity from damage liability under 42 U.S.C. § 1983.

Briscoe, in fact, held that a police officer testifying at a trial enjoyed absolute witness immunity for his testimony. But a number of circuit courts have limited the application of *Briscoe*. In *Wheeler v. Cosden Oil and Chemical Co.* 734 F.2d 254, 261 (5th Cir.) *mod. on other grounds*, 744 F.2d 1131 (1984), the Court ruled that *Briscoe's* absolute immunity for a witness' testimony at trial did not apply to one who knowingly gave false testimony at a probable cause hearing. Another court declared that *Briscoe's* witness immunity did not extend to cover a witness engaged in an extrajudicial conspiracy with a prosecutor to give false testimony. *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246, 255 (2nd Cir. 1984), *cert denied* 105 S. Ct. 1408 (1985). And in *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) the Court held that *Briscoe* did not call for the granting of absolute immunity to a law enforcement officer who allegedly made intentional misrepresentations in a search warrant affidavit. Some of these questions had been specifically reserved by this Court in *Briscoe*. *Briscoe v. LaHue*, *supra* at 329 n.5. This Court also held, in *Tower v. Glover*, 104 S. Ct. 2820, 2826 (1984), that a public defender who allegedly conspired with state officials to convict the plaintiff had no absolute immunity from liability, despite the degree to which the defender was an integral part of the judicial process.

The instant case involves a social worker (Price) who held himself out as a psychotherapist and who was directed by the family court to evaluate the Myers children and to determine their counseling needs. When this was done, however, he suppressed the results of psychological testing showing that the oldest Myers child was on the verge of a nervous breakdown due to protracted separation from his parents, and commenced nine months of multi-week interrogation of the children directed at procuring the conviction of their parents, sharing said information with the prosecutors and police. This "therapist" participated in at-the-scene police investigation and reported to the police and prosecutor. In September, 1984 the family court

judge who had appointed respondent Price for highly limited purposes specifically stated that he had not authorized Price to do what he had been doing, and that Price did it at his own peril. Another family court judge severely criticized Price's conduct in dealing with these children. *In Re Myers Children, Scott County Juvenile Court February 11, 1985 Order - Findings 14 and 18.*

The guardians and other therapists in this case also served as mouthpieces for the prosecution, exercising no independent judgment as ordered by the court, and acting counterproductive to the children's best interests contrary to court order. Whether such illegitimate conduct is protected by absolute immunity — simply because these parties were appointed by a court — is an important question of federal law which has not been, but should be, settled by this Court.

6. *Police Immunity.* In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In *Malley v. Briggs*, 106 S. Ct. 1092 (1986), this Court applied the *Harlow* "objective reasonableness" standard in a situation where an officer sought an arrest warrant by submitting a complaint and supporting affidavits to a judge. Good faith immunity is not available to such an officer, this Court held, if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and he should not have applied for the warrant."

In the *Myers-Buchan* cases, plaintiffs allege that the arresting officers were not properly trained; and regardless of training, would have known that there was insufficient probable cause to arrest. Among the indicia of unreliability of the child complainants were their initial and repeated denial of sexual abuse, major inconsistencies in their stories, inconsistencies between their stories, and the lack of corroborative evidence. The Court of Appeals for the Eighth Circuit concedes that petitioners'

"allegations of judicial deception may state a claim that the deputies deliberately or recklessly incorporated known falsehoods into their reports, criminal complaints and warrant applications" and that if these claims were established, then the deputies did not engage in objectively reasonable conduct. However, the Eighth Circuit panel then transforms itself into a three-person jury and declares that because plaintiffs have submitted no proof to cement these allegations prior to discovery, they will be given no opportunity to prove the allegations. The panel acknowledges that plaintiffs have adduced evidence that leading questions, photographs of suspects and information concerning statements by other children (cross-fertilization of witnesses) were used in questioning sessions. With respect to the interrogation of children, the Eighth Circuit panel again acts as a superjury and decides, without having the benefit of plaintiffs' experts' testimony, that the kind of questioning which was perpetrated upon children by the police respondents violated no clearly established legal norm.

By granting respondent officers good faith immunity before giving plaintiffs an opportunity to present evidence establishing lack of objective reasonableness, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, and with the decisions of other federal courts of appeals. In *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815 (1985), this Court stated that if a plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Id.* at 2816. On a pre-discovery summary judgment motion permitted by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), however, this Court repeatedly cautioned that the appealable issue is a *purely legal one*:

"An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a *question of law*: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.."

Mitchell v. Forsyth, supra at 2816 (emphasis added). *See also Id.* at 2816 n. 9, 2817, 2817 n. 10. The Court of Appeals for the Eighth Circuit concedes that the right to be free from arrest without probable cause, for example, was clearly established in 1984.

In *Malley v. Briggs, supra*, this Court had the benefit of a complete trial presentation by plaintiffs⁴ but nevertheless remanded for trial on the issue whether the officer's conduct, from an objective standpoint, was plainly incompetent or knowingly violative of the law.

Assuming for the sake of argument that the pre-discovery summary judgment issue in this case was not a purely legal one, plaintiffs were given no notice that these interlocutory appeals would be treated as post-discovery summary judgment motions. Certainly the distict court did not read this Court's decisions to permit such treatment; Minnesota District Court Judge Harry MacLaughlin observed that,

"The deputy sheriff's alleged misconduct involves the violation of clearly established rights, and thus they cannot obtain summary judgment before plaintiffs have had the opportunity to conduct discovery...In sum, granting the deputy sheriff's summary judgment prior to determining precisely what their conduct was, would be inappropriate."

⁴The case was dismissed by the trial judge before the defense case began.

See *Beard v. Udall*, 648 F.2d 1264, 1272 (9th Cir. 1981) (per curiam). Petitioners' consequent understanding was specifically stated in their brief to Court of Appeals for the Eighth Circuit:

"A complete presentation of the facts of each of these cases is not necessary for this Court of Appeals to render its decision on this appeal, however, because the issues on appeal are legal ones which require an examination of only a few undisputed facts upon which appellants' potential liability is based."⁵

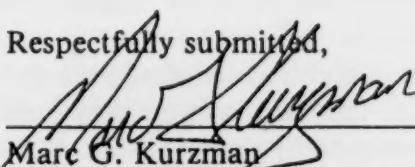
However, the Court of Appeals, without notice to the parties, treated the summary judgment motions as post-discovery submissions and decided that because plaintiffs had not made the kind of factual showings they could have made with notice of this procedural sleight-of-hand, they were not entitled to present their cases to a jury. This holding conflicts with that of the Court of Appeals for the Ninth Circuit in *Lucas v. Bechtel Corp.*, 663 F.2d 757 (1980). The court there held that plaintiffs were not given a reasonable opportunity to complete discovery and present the necessary factual support for their claims, where the district court, in granting a motion to dismiss for failure to state a claim, considered affidavits and other matters outside the pleadings without allowing sufficient fact gathering as provided in the rules. Considering affidavits and other materials outside the pleadings brings into consideration the procedures which are applicable to summary judgment and mandates a reasonable opportunity for the parties to present *all* materials made pertinent by Rule 56, held the court. *Accord, Marine Coatings, Inc. v. U.S.*, 792 F.2d 1565 (11th Cir. 1986) (party opposing motion to dismiss has right to reasonable notice that motion will be treated as motion for summary judgment); *Ten-Mile*

⁵In their Eighth Circuit brief, Respondents made such bold factual assertions outside the record that Petitioners felt compelled to display some of these extrarecord assertions were inaccurate. Brief of Appellees to the Court of Appeals for the Eighth Circuit, p. 4.

Indus. Pk. v. Western Plains Service Corp., 810 F.2d 1518, 1528 (10th Ci. 1987) (speaking to opportunity to *present* as well as to develop factual support plaintiff's theories on a summary judgment motion).

May 7, 1987

Respectfully submitted,


Marc G. Kurzman

Attorney Registration No. 59080

Counsel of Record

Carol Grant

Attorney Registration No. 36870

KURZMAN, GRANT, MANAHAN

BLUTH AND BARKER

2404 Stevens Avenue South

Minneapolis, Minnesota 55404

(612) 871-9004

Counsel for Petitioners

